U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 11 May 2004

CASE NO.: 2002-LHC-01336

OWCP NO.: 14-126578

In the Matter of:

HAROLD ODDEN,
Claimant,

vs.

LOUIS DREYFUS CORPORATION,
Employer,

and

CRAWFORD & COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances: Charles Robinowitz, Esquire
For the Claimant

Delbert Brenneman, Esquire
For the Employer/Carrier

Matthew L. Vadnal, Esquire
For the Director

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION AND GRANTING CLAIMANT'S MOTION FOR RECONSIDERATION IN PART

INTRODUCTION

This matter involves a claim for disability benefits filed by the Claimant, Harold Odden, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. ("the Act"). At the hearing on May 19, 2003, in Portland, Oregon, the Claimant sought a determination of permanent disability arising from industrial injuries he suffered on October 1, 1997, when he injured his arm, neck and shoulder while working for Louis Dreyfus Corporation.

On March 17, 2004, I issued a Decision and Order granting the Claimant permanent partial disability benefits for both his scheduled and unscheduled injuries. I found that the Claimant reached maximum medical improvement on August 10, 1999. I further found that the Claimant's average weekly wage at the time of his injury was $1,090.00, and his adjusted post-injury wage earning capacity was $676.37. In addition, I found that the Employer was not entitled to Section 8(f) Special Fund relief. Both the Respondent and the Claimant have filed Motions for Reconsideration.

The Respondents' Motion for Reconsideration asks for:

1. The scheduled permanent partial disability award of 5 percent for the Claimant's left arm to be vacated;

2. The *de minimus* award for the Claimant's unscheduled permanent partial disability to be vacated;

3. Recalculation of the Claimant's residual wage earning capacity using the *Matulic* method.

The Claimant's Motion for Reconsideration asks for:

1. A statement that the court did not resolve all factual doubts in favor of the Claimant in determining the Claimant's entitlement to permanent partial disability benefits;

2. Recalculation of the Claimant's pre-injury average weekly wage;

3. Recalculation of the Claimant's residual wage earning capacity to include different vacation pay from the vacation pay used in the decision.

Of these issues raised by the Respondents and the Claimant, I find it necessary to clarify or amend only the issues addressed below.

Scheduled Permanent Partial Disability Award of Five Percent for Claimant's Left Arm

The Respondents assert that the Claimant is not entitled to a five percent award of permanent disability to his left arm. They allege that the Claimant's treating physician, Dr. Peterson, failed to explain the reasoning behind the five percent permanent disability rating and that he based his finding on the Claimant's subjective complaints of pain.

As explained in the March 17, 2004, Decision and Order, the Ninth Circuit has held that a treating physician's opinion is entitled to substantial weight. *Amos v. Director,* OWCP, 153 F.3d 1051 (9th Cir. 1998), (order revised at 164 F.3d 480 (9th Cir. 1999)). In this case, the Claimant's treating doctor, Dr. Peterson, treated the Claimant for more than three years, performed a surgery on the Claimant's left arm, and ultimately rendered his opinion on the percentage of Claimant's impairment of the arm. The medical records in evidence, as well as the testimony of the Claimant, support Dr. Peterson's finding. Further, the Respondents failed to present any evidence contradicting Dr. Peterson's finding. Accordingly, the Respondents' request that the five percent permanent disability award be vacated is hereby DENIED.

***De minimus* Award for Claimant's Unscheduled Permanent Partial Disability**

The Respondents argue that the *de minimus* award for the Claimant's unscheduled permanent partial disability was inappropriate in this case. They allege that there was no evidence supporting the possibility of the Claimant's future loss in wage earning capacity.

As explained in the March 17, 2004, Decision and Order, the Claimant's post-injury work restrictions limited his ability to accept jobs and therefore created the possibility that his wage earning capacity would decrease. Although the Claimant initially worked the same amount of hours after the injury, as he worked before the injury, he was not able to work in his normal capacity. He testified that his arm was not the same as before the injury and that it caused him pain. (HT, p. 71.) The Claimant faced a struggle while at work. As the Respondents pointed out, he "gritted [his] teeth and got through [the workdays]." (HT, p. 60.) Due to the Claimant's physical limitations, he faced the risk of reduced hours. This risk became a reality when he was laid off on April 4, 2002. The layoff demonstrated that indeed there had been a possibility for the Claimant's future loss in wage earning capacity.

In sum, the Claimant first faced a risk of reduced wage earning capacity after his injury. He then actually experienced a reduction in wage earning capacity, transforming the possibility of such into a reality. It is therefore clear that the Claimant is entitled to a *de minimus* award for his unscheduled permanent partial disability from August 10, 1999, through April 4, 2002.[1] Accordingly, the Respondents' request that the *de minimus* award for the Claimant's unscheduled permanent partial disability be vacated is hereby DENIED.

[1] As stated in the March 17, 2004, Decision and Order, this nominal award from August 10, 1999, through April 4, 2002, excludes the time period between October 16, 2001, and October 22, 2001, when the Claimant was already receiving temporary totally disability for a flare-up.

Claimant's Pre-injury Average Weekly Wage

The Claimant asks that his pre-injury average weekly wage be recalculated in accordance with the following propositions, which are addressed in separate sequence below:

The 52 weeks before the Claimant's injury is the period from October 2, 1996, through October 1, 1997, not the period from September 30, 1996, through October 1, 1997.

To calculate average weekly wage pursuant to section 10(a), one must divide the Claimant's actual earnings for the 52 weeks prior to the injury, by the number of days he actually worked during that period. 33 U.S.C. § 910(a). The Claimant argues that the 52 weeks preceding the Claimant's October 1, 1997, injury consist of October 2, 1996, through October 1, 1997, instead of September 30, 1996, through October 1, 1997, as indicated in the March 17, 2004, Decision and Order.

The Claimant is correct. The year immediately preceding the Claimant's October 1, 1997, injury is comprised of the period from October 2, 1996, through October 1, 1997, not the period from September 30, 1996, through October 1, 1997. Therefore, the Claimant's request that his average weekly wage be recalculated using the time period from October 2, 1996, through October 1, 1997, is hereby GRANTED.

Vacation pay earned in 1996 and 1997, but paid in 1997 and 1998, should be considered in determining the Claimant's average weekly wage.

The Claimant argues that instead of using his vacation pay earned in 1995 and 1996, and paid in 1996 and 1997, respectively, to calculate his average weekly wage, I should have used his vacation pay earned in 1996 and 1997, which was paid in 1997 and 1998.

The Ninth Circuit has held that money earned but not necessarily received in the year before an injury, can be used to determine a claimant's average weekly wage. *Sproull v. Director, OWCP, 86* F.3d 895, 899, 30 BRBS 49 (CRT) (9th Cir. 1996), cert. den., 520 U.S. 1155 (1997). In this case, the Claimant received $2,078.40 on March 1, 1997, for his vacation earned in 1996. The Claimant then received $2,158.40 on March 1, 1998, for his vacation earned in 1997. Because the relevant period for determining the Claimant's average weekly wage is October 2, 1996, through October 1, 1997, one quarter of the Claimant's vacation earned in 1996 and three quarters of the Claimant's vacation earned in 1997 is relevant to a determination of the Claimant's average weekly wage. This calculates out to be $519.60 in vacation pay for 1996 and $1,618.80 in vacation pay for 1997, for a total of $2,138.40 of vacation pay earned from October 2, 1996, through October 1, 1997. Accordingly, the Claimant's request that his average weekly wage be recalculated to include vacation pay earned in 1996 and 1997, is hereby GRANTED.

When the Claimant actually worked on a holiday, the holiday should be counted only as one "day worked" instead of two.

The Claimant argues that, in determining the Claimant's average weekly wage, the court erroneously added 15 holidays to the 247 days it found the Claimant actually worked, for a total of 262 days. The Claimant asserts that because he worked on some of those 15 holidays, the

days should not be counted twice (once as a holiday and once as a day worked). The Claimant is correct.

However, while the Claimant asserts that this double counting only occurred on November 11, 1996, February 17, 1997, and July 28, 1997, it actually also occurred on October 25, 1996, and December 20, 1996. Because the Claimant worked on 5 of the 15 holidays that occurred from October 2, 1996, through October 1, 1997, only 10 days should be added to the days the Claimant actually worked. Accordingly, the Claimant's request that the holidays worked be counted only as one day for purposes of calculating the Claimant's average weekly wage is GRANTED.

Because the Claimant's requests have been granted with respect to recalculating various components of his average weekly wage, it is necessary at this point to recalculate the Claimant's average weekly wage. As evidenced by the Claimant's Pacific Maritime Association ("PMA") records, the Claimant earned $59,043.10, from October 2, 1996, through October 1, 1997, as itemized below:

• October 2, 1996 → December 20, 1996	$14,250.76
• December 21, 1996 → March 20, 1997 (first quarter, 1997)	$13,688.68
• March 24, 1997 → June 20, 1997 (second quarter, 1997)	$12,967.56
• June 23, 1997 → September 19, 1997 (third quarter, 1997)	$14,007.00
• September 21, 1997 → October 1, 1997	$ 1,990.70
• Vacation pay earned in 1996 and 1997	$ 2,138.40
TOTAL	$59,043.10

A closer examination of the Claimant's PMA records for the correct time period shows that the Claimant actually worked a total of 244 days from October 2, 1996, through October 1, 1997. In his re-calculation of the average weekly wage, the Claimant counted as separate days worked, entries for ½ hour of work on May 29, 1997, and for 1 hour of work on December 11, 1997. I also counted the 1 hour entry for December 11, 1997, as a day worked, but, as noted in my decision, I decided not to count the ½ hour entry for May 29, 1997, as a day worked.

In the process of re-examining the PMA records to re-compute the Claimant's average weekly wage, I discovered that there were already entries for May 29 and December 11, 1997. There was a separate entry for May 29, 1997, showing the Claimant worked 9 hours, and a separate entry for December 11, 1997, showing he worked 8 hours. The separate listings for ½ and 1 hour of work on those two days should not be separately counted as additional work days. Thus, after making the adjustments discussed above, I find the Claimant worked 244 days from October 2, 1996, through October 1, 1997.

To calculate the Claimant's average weekly wage, the Claimant's 244 workdays must be combined with the holidays for which the Claimant was paid, but didn't work. The Claimant was paid for 15 holidays, 5 of which he worked. This amounts to a total of 254 days (244 days worked + 10 holidays not worked = 254). Accordingly, the Claimant's daily wage is $232.45

($59,043.10 divided by 254 days = $232.45). Based on these 254 days, the Claimant worked approximately five days per week (254 divided by 52 weeks = 4.9). Under the formula for a five-day worker ($232.45 multiplied by 260), the Claimant's average annual earnings are $60,437.00, and his average weekly wage is thereby $1,162.25.

Claimant's Residual Wage Earning Capacity

Both the Respondents and the Claimant request reconsideration of the Claimant's residual wage earning capacity.

Respondents' Request for Recalculation of the Claimant's Residual Wage Earning Capacity Using the* Matulic *Method

The Respondents argue that the Claimant's post-injury wage earning capacity should be recalculated using the method articulated in *Matulic v. Director, OWCP,* 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998). They assert that because the Claimant's pre-injury average weekly wage was calculated using the *Matulic* method, the Claimant's wage earning capacity should be calculated using the same method. I am not persuaded that *Matulic* is the correct methodology to compute the post-injury wage earning capacity. Thus, the Respondents' request for recalculation of the Claimant's residual wage earning capacity using the *Matulic* approach is hereby DENIED.

Claimant's Request for Recalculation of His Residual Wage Earning Capacity to Include Vacation Pay

The Claimant asks that his residual wage earning capacity be recalculated to include his vacation earnings. From April 5, 2002, through May 16, 2002, the Claimant earned $4,821.82, which he claims yields an average weekly wage of $803.64. The Claimant argues that, after adding vacation pay into the calculation, his average weekly wage should be increased to $868.83. The Claimant asserts that incorporating the 17.8 percent discount then reduces this figure to $714.18 per week.

In the March 17, 2004, Decision and Order, the Claimant's average weekly wage was calculated by dividing the Claimant's $4,821.82 in earnings from April 5, 2002, through May 16, 2002, by a period of 5.8 weeks, instead of by the six weeks the Claimant used in his calculation. I failed to count April 5, 2002, in the calculation of the number of weeks the Claimant worked. By including the April 5, 2002, date, the Claimant worked for exactly six weeks to earn his $4,821.82. This $4,821.82 in earnings in the six-week period translates to earnings of $41,789.11 over 52 weeks, and an average weekly wage of $803.64, as determined by the Claimant above.

As the Claimant requests, vacation pay should be added to the Claimant's earnings even though the Claimant did not actually receive the vacation pay during the April 5, 2002, through May 16, 2002, time period. The Claimant's counsel stated in a clarification on May 3, 2004, that in making the calculation, he added to the Claimant's earnings vacation pay that the Claimant had earned in 1997. This is incorrect. Applying the same theory for incorporating earned vacation pay in calculating the average weekly wage, the Claimant's post-injury wage earning

capacity should be computed using the vacation pay he earned during the post-injury time period. Thus, the Claimant's counsel should, instead, have added the vacation pay the Claimant earned in 2002.

On January 1, 2003, the Claimant received $1,176.00, for his vacation pay earned in 2002. This figure, when added to the computed annual earnings of $41,789.11 increases his calculated annual post-injury earnings to $42,965.11, for an increased average weekly wage of $826.25. As stated in the March 17, 2004, Decision and Order, to make an accurate comparison of the Claimant's post-injury earnings to his pre-injury earnings, his post-injury earnings must be reduced by 17.8 percent. To calculate the Claimant's reduced earnings, his post-injury average weekly wage must be multiplied by 82.2 percent (100%-17.8%). Thus, in this case, $826.25 multiplied by 82.2 percent yields an adjusted post-injury wage earning capacity of $679.18. Accordingly, the Claimant's request for recalculation of his residual wage earning capacity to include vacation pay is hereby GRANTED. However, the Claimant's request that vacation pay earned in 1997, rather than that earned in 2002, be used in the determination of his residual wage earning capacity is hereby DENIED.

ORDER

The Respondent's Motion for Reconsideration is DENIED. The Claimant's Motion for Reconsideration is GRANTED in part and DENIED in part.

Accordingly, Paragraph 3 of the Order in my March 17, 2004, Decision and Order is modified to read as follows:

> 3. Louis Dreyfus Corporation and Crawford & Company shall make payments to the Claimant for his unscheduled permanent partial disability benefits beginning April 5, 2002, based on a pre-injury average weekly wage of $1,162.25 per week and a post-injury adjusted wage earning capacity of $679.18.

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JENNIFER GEE
Administrative Law Judge